Supreme Court, U.S.
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NO. 94-1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Rosemary Rahn,
Plaintiff

vs Case No. C-1-91-027

Drake Center, Inc.
Defendant

ORDER

This case is before the Court upon defendant Drake Center Inc.'s motion for summary judgment (Doc. 16), plaintiff Rahn's memorandum in opposition (Doc. 19), Drake's reply (Doc. 22), Rahn's supplemental affidavit and documents (Doc. 25), Drake's reply thereto (Doc. 26), and the parties' joint list of disputed and undisputed

facts. (Doc. 23).

Rahn alleges that Drake discharged from her employment in retaliation for the exercise of her First and Fourteenth Amendment rights to free speech, pursuant to 42 U.S.C. § 1983 and the Ohio Constitution, Article I, § 11. She also alleges the state law tort of wrongful discharge. (Doc. 1).

Drake asserts that this Court has no jurisdiction over Rahn's § 1983 claim because her discharge did not constitute state action. Drake also claims no federal rights were violated because Rahn's speech did not involve matters of public concern. Drake further claims that, because no federal claims exist, the Court has no jurisdiction over her state claims. Finally, Drake claims this Court should decline to exercise pendent jurisdiction over Rahn's state

law claims.

Undisputed Facts

The parties have agreed the following facts are disputed.

1. Prior to 1989, Daniel Drake Memorial Hospital (DDMH), a hospital established pursuant to Ohio Revised Code Chapter 339, was a public institution owned and operated by Hamilton County, a political subdivision of the State of Ohio.

2. Plaintiff was employed by DDMH as a Licensed Practical Nurse from 1982 to June 30, 1989.

3. In February 1988, DDMH hired a new Administrator, Earl Gilreath, to institute the major changes necessary to regain the hospital's reaccreditation and Medicare certification, which

were lost in January and February 1988. The hospital subsequently obtained its reaccreditation and Medicare certification while Gilreath was the Administrator.

4. After experiencing various difficulties such as "the Donald Harvey incident" and the loss of the accreditation and Medicare certification the County decided in 1989 to cease operating DDMH and lease its facilities to a private corporation pursuant to O.R.C. § 140.05. Gilreath was instrumental in orchestrating the change.

5. Defendant Drake Center, Inc. is a private nonprofit Ohio corporation, which was created on May 17, 1989. A true and correct copy of Drake's Articles of Incorporation is provided in Doc. 16, Exhibit A, Attachment 1.

6. Effective July 1, 1989, Hamilton County leased the DDMH facilities to Drake.

7. DDMH still exists as a separate legal entity.

8. On June 2, 1989, Hamilton County and the University of Cincinnati (UC) entered into a written agreement that provided for the continued operation of the hospital facilities through a lease of the facilities to a private corporation and set forth the obligations of the parties. A true and correct copy of this agreement is provided in Doc. 16, Exhibit A, Attachment 4. The relevant provisions of this agreement are as follows:

a. Section 1.1 of the agreement states that "the County and the University recognize that, by virtue of the lease of Daniel Drake Memorial Hospital (hereinafter "Hospital) to a private, nonprofit corporation known as "Drake Center, Inc." (hereinafter "Corporation") and by virtue of the agreement by Corporation to operate the Hospital, neither the University nor the County shall have control of the operation of Hospital following

transfer of Hospital Facilities and Hospital Funds to the Corporation. Nevertheless, the parties to this Agreement desire that certain principles apply to the operation of the Hospital and expressly set forth these principles of this Article I. Without attempting to usurp or displace the power, authority or fiduciary obligations of the Board of the Corporation, it is the desire of the parties that the principles contained in this Article I serves as guidelines for the future operation of the Hospital. Both parties agree to make their respective appointments to the Board of the Corporation aware of the guidelines prior to making the appointment."

b. Sections 1.4 and 1.6 state that Drake is free to appoint non-UC physicians to its medical staff and to affiliate with any institution of its choice for educational purposes.

c. In Section 2.1, UC agrees to create Drake.

d. Section 2.1(a) states that Drake's Board of Trustees will be comprised of nine individuals, six of whom are appointed by UC and three of whom are appointed by Hamilton County.

e. In Section 2.2, UC agrees to assign

members of its University Hospital Housestaff (medical school graduates in postgraduate training) to assist in providing medical care to hospital patients.

f. In Section 2.3, UC agrees to assign an adequate number of members of the its College of Medicine faculty to: (a) coordinating teaching and provide supervision of University Hospital Housestaff; (b) perform administrative and supervisory functions for the Hospital as required for accreditation of its facilities; and (c) make clinical knowledge and expertise available to the medical staff, personnel and patients of the Hospital.

g. Section 2.4 states that upon execution of the Lease and Operating Agreement between Hamilton County and Drake, but prior to the transfer of the Hospital Facilities and Funds to Drake, UC agrees to make faculty and employees of its University Medical Center available to the hospital to participate in strategic planning, financial planning, budget development, operational planning and planning for the delivery of medical care and patient care for the continued operation of the hospital.

h. In Section 2.5, UC agrees to provide a chief executive officer, who will

remain a UC employee and be contracted to operate Drake.

i. In Sections 3.1 and 3.2, Hamilton County agrees to use its best efforts to pass the Drake Hospital tax levy in the Spring of 1989 and to annually transfer the proceeds of the Lease and Operating Agreement between Hamilton County and Drake.

j. Section 5.7 provides that obligations of Drake shall not constitute debts of UC, Hamilton County, or the Hamilton County Commissioners unless "expressly made otherwise."

k. Section 1.2 provides that Drake shall be administered, maintained, and operated as a hospital in compliance with the terms of the Lease and perating Agreement. It also states that the hospital facilities or services shall be provided in manner that does not discriminate by reason of race color, religion, sex, age or national origin.

l. Section 1.8 provides that Drake shall provide care to all indigent and medically indigent citizens of Hamilton County who meet its admission criteria to the extent that Drake is reimbursed for the cost of such care by the proceeds of the Drake Hospital tax levy then in effect.

9. On June 2, 1989, pursuant to O.R.C. § 140.05, Hamilton County and Drake entered into a Lease and Operating Agreement to become effective July 1, 1989. A true and correct copy of the Agreement is provided in Doc. 16, Exhibit A, Attachment 6. The pertinent provisions of the Agreement are as follows:

a. Pursuant to Sections 2.3, 2.4 and 2.5, the initial term of the lease is fifty years and it includes an option for Drake to purchase the property outright. Drake leases the hospital premises for one dollar per year.

b. Under Section 2.8, Drake assumes all risk of loss and is responsible for all operational liabilities with respect to the leased premises as of July 1, 1989.

c. Section 5.4 provides that the DDMH employees end their Hamilton County employment on July 1, 1989.

d. Pursuant to Section 5.2(e) and (g), Drake is free to affiliate with any institution of its choice for educational purposes and is not to restrict its medical staff appointments to UC faculty.

e. In Section 1.5, pursuant to O.R.C. Chapter 140, one of the purposes of the Agreement is stated to be to serve the highest public interest in promoting the health and welfare of the citizens of the County and State.

f. Section 5.2(c) requires Drake to maintain the hospital's legal authorization to operate as an Intermediate Care Facility, Skilled Nursing Facility, and Hospital under Ohio law and pursuant to Medicare and Medicaid regulations. Section 5.2(i) requires Drake to provide to all indigent and medically indigent citizens of Hamilton County to the extent it is reimbursed for the cost of such care by the proceeds of the tax levy and to the extent the citizen meets is admission criteria.

g. Section 5.2(k) requires Drake to submit semi-annual and annual reports to the Hamilton County Commissioners to demonstrate that it is in compliance with the terms of the Agreement.

h. Section 8.11 states that Drake's obligations or liabilities, including those arising from operation of the hospital, shall not constitute debts of Hamilton County, DDMH Trustees, or County Commissioners "unless expressly made otherwise."

i. Section 8.12 states that the Agreement is contingent upon the passage of the Drake Hospital tax levy.

10. Pursuant to the aforesaid Agreement, on July 5, 1989, UC contracted with Drake to provide a Chief Executive Officer. A true and correct copy of this contract is set forth in Doc. 19, Appendix 2.

11. Under the July 5, 1989 contract, Earl Gilreath, the former DDMH Administrator, was appointed Drake's President and Chief Executive Office by the Drake Board of Trustees and UC President Joseph Steger. The pertinent provisions of the contract are as follows:

a. Pursuant to Section 1, the President shall be appointed by and accountable to Drake's Board of Trustees for the management and operation of the hospital. Gilreath, as President, shall serve at the pleasure of Drake's Board of Trustees, subject to certain provisions, but shall remain a UC employee while serving the Board of Trustees.

b. Section 2(C) states that Gilreath, as President, shall be responsible for Drake's day-to-day administration and operation. His responsibilities include employment, training, and supervision of all medical and non-medical personnel necessary to manage, staff, operate, and maintain the hospital. He is given discretion to delegate said responsibilities to Drake employees; however, he remains accountable to the Board of Trustees for the fulfillment of these responsibilities.

c. Section 3 states that the manner and amount of the President's compensation and benefits are matters of negotiation between UC and the President. In exchange for the services of the President, Drake shall reimburse UC for a portion of both the President's compensation and the direct costs of his benefits.

d. Section 4(B) authorizes Drake to terminate the President for cause.

12. Gilreath assigned to Michael Costa, Drake's Vice-President of Human Resources, responsibility for all personnel decisions, including hiring, disciplining, and firing

employees, except the medical staff and the officers reporting directly to the President or the Board of Trustees.

13. Drake's Code of Regulations requires that its Board of Trustees consist of nine members - six appointed by UC and three appointed by the Hamilton County Commissioners. Although the Board members are appointed by UC and Hamilton County, the majority are businessmen who have no other affiliation with UC, Hamilton County, or the State of Ohio. A true and correct copy of Drake's Code of Regulations is provided in Doc. 16, Exhibit A, Attachment 2. A true and correct listing of Drake's Board of Trustees is provided in Doc. 16, Exhibit A, Attachment 3.

14. Drake's Board of Trustees has no responsibility for the day-to-day administration of the hospital.

15. Every applicant for employment with Drake, including former DDMH employees has been required to complete Drake's employment application.

16. Plaintiff Rosemary Rahn applied for and obtained the position of Licensed Practical Nurse with Drake effective July 1, 1989.

17. Effective July 1, 1989, Drake established a three month orientation period for all of its employees, including all former DDMH employees it hired. Drake's Orientation Policy provides that "employees who accumulate three points (as specified in the attendance guide) will have employment terminated." Under the terms of Drake's Attendance Policy, employees who have an unscheduled absence for one day are assessed one point. Employees who do not give proper notice of such absence (one hour before

their scheduled shift) are assessed two points. The section of the Attendance Policy titled "Absent No Show No Call" states that "a failure to report an absence for the entire scheduled shift shall be dealt with as a serious issue under the disciplinary policy." A true and correct copy of the Orientation Policy is provided in Doc. 16, Exhibit B, Attachment 1. A true and correct copy of the Attendance Policy is provided in Doc. 19, Appendix 1, Exhibit 3.

18. On July 18, 1989, Rahn was assessed one point under the Attendance Policy for an unscheduled absence.

19. According to the schedule that was printed on July 12, 1989 for the period July 16, 1989 - August 12, 1989, Rahn was scheduled to work the day shift on July 21, 1989. The day shift is 7:00 a.m. to 3:30 p.m.

20. On July 21, 1989, Rahn was assessed two points under the Attendance Policy for being absent from work without proper notice. Costa had the following notice delivered to Rahn by courier at approximately 4:00 p.m. July 21, 1989:

> The purpose of this letter is to advise you that you have accumulated three points for an unscheduled absence on July 19, 1989, and being absent without notice on July 21, 1989. Unscheduled absences and being absent without call can cause a problem delivering patient care. It is for this reason that employees in orientation who accumulate three points will have employment terminated. You were advised of Drake Center's orientation guidelines on July 10, 1989.
>
> Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guidelines as soon as possible but, not later than noon on July 22, 1989.

Doc. 16, Exhibit B, Attachment 3.

21. At approximately 9:50 a.m. on July 22,

1989, Rahn contacted Drake and spoke with Brenda Barnard. Rahn told Barnard that she was not aware she had been scheduled to work on July 21, 1989.

22. On July 25, 1989, Costa and Rahn telephonically discussed her failure to appear for work on July 21, 1989. Costa requested that Rahn appear personally at Drake to discuss the situation, and Rahn indicated she could not do so because she was babysitting at her son's house. Costa asserted, based upon other information he possessed, that Rahn was not babysitting. Rahn stated that she had not known she was scheduled to work on July 21, 1989. Costa informed Rahn it was her responsibility to check the schedule.

23. On July 26, 1989, Costa directed a letter to Rahn, which included the following statements:

> The reason you gave for the July 21, absence, was that you didn't know you were scheduled. The schedule was posted July 12, you worked July 17, 1989. As you indicated, you realize that you are responsible for knowing your schedule and I agree with that.
>
> The orientation guidelines indicate that an employee in orientation who receives three (3) points, will be terminated. Your employment is therefore terminated.

Doc. 16, Exhibit B, Attachment 4.

24. Drake discharged eleven other employees pursuant to the Orientation Policy between July 1, 1989 and September 30, 1989.

25. The decision to discharge Rahn was made solely by Costa, Vice President of Human Resources, and Barbara Bussman, Director of Nursing. At the time of Rahn's discharge, Costa and Bussman were employed solely by Drake.

26. Prior to Rahn's discharge, Costa did not consult with or discuss the decision to

discharge her with any of Drake's Trustees, with Drake's President, or with any representatives of Hamilton County, UC or any other public body.

27. During an unspecified time period, Rahn was Chairman of the Committee to Maintain and Improve Drake Hospital. The Committee was comprised of former DDMH employees, past and present Drake employees, Drake patients and family members, and citizens of Hamilton County. The list of committee members attached to its July 19, 1989 press release indicates that there were approximately 100 committee members; however, this number has not been verified with each person included on the list.

28. The Committee issued two press releases concerning Drake and Mr. Gilreath; one dated July 18, 1989 and one dated July 19, 1989. The latter contained three separate releases. The parties

dispute whether Rahn approved the issuance of the handwritten press releases or the handwritten list of complaints in Doc. 16, Exhibit A, Attachments 7 and 9. True and correct copies of these releases are in Doc. 16, Exhibit A, Attachment 7, 8, and 9.

29. Rahn was scheduled to work on July 18, 1989, from 7:00 a.m. to 3:30 p.m. She called in prior to her shift and stated that she would not be present at work that day. She conducted a press conference at Drake that day, during which she requested Gilreath's resignation.

30. At approximately 4:00 p.m. on July 18, 1989, Rahn hand-delivered a version of the July 18, 1989 press release to Linnea Lose of Drake's Public Relations Department. Gilreath was not present at Drake when this press release was delivered, but he subsequently read both the July

18, 1989 and July 19, 1989 press releases.

31. On the evening of July 18, 1989, Rahn appeared on a local news broadcast. Gilreath saw the news broadcast. The parties have not stipulated the contents of the broadcast.

32. Gilreath received a letter from Rahn dated August 1, 1989, in which she indicated her intent to file a grievance regarding her discharge. Gilreath forwarded the letter to the Human Resources Department. No one from Drake replied to this letter.

33. Drake receives approximately 50-55% of its annual budget from the Drake Hospital tax levy.

34. The benefit system at Drake is different from that of DDMH, being governed by Drake policy rather than by statute. A summary of the differences in benefits is provided in

Doc. 16, Exhibit B, Attachment 2.

35. Until its full nine-member Board could be appointed, Drake utilized an interim Board comprised of Joseph Steger, UC President, Donald Harrison, UC Vice President of Medical Affairs, and Thomas Wenz, Hamilton County Administrator. This interim Board governed Drake from July 1, 1989 until September 28, 1989.

36. Dr. Joseph Steger, Chairman of Drake's Board of Trustee, is also President of UC.

37. The stated reason for plaintiff's termination was her accumulation of three points under Drake's Orientation and Attendance Policies.

38. To the best of Drake's knowledge, no one attempted to contact Rahn on the morning of July 21, 1989, to ascertain why she did not appear for work.

39. The Orientation and Attendance Policies under which Rahn was terminated were approved by the interim Board of Trustees, Gilreath and Costa.

40. A representative of Drake contacted Priority One, a courier service, at approximately 2:56 p.m. on July 21, 1989 to request that they deliver a letter dated July 21, 1989 from Costa to Rahn.

41. Rahn neither reported to nor was supervised by Gilreath or Costa.

42. On July 1, 1989, an article appeared in the Cincinnati Post newspaper, stating that Drake was preparing to move 75% of its patients out to nursing homes, hospices or back to their families.

43. To the best of Drake's knowledge, no one contacted Rahn prior to July 21, 1989,

regarding the fact that the schedule that was printed July 12, 1989 was different from the schedule she had worked since January of 1989.

44. The parties agree that a computer or clerical error could have been the reason plaintiff was scheduled to work on July 21, 1989.

45. Mary Lynn, a Registered Nurse, was scheduled to work on July 18, July 25, and July 28, 1989. Lynn had an unexcused absence on July 18, 1989, and was assessed one point under the Attendance Policy. Lynn did not work on July 25, 1989 or July 28, 1989, and Drake's call off sheets do not reflect that she called off work on those days. A true and accurate copy of Lynn's schedule is in Doc. 19, Appendix 1, Exhibit 2. True and accurate copies of Drake's call off sheets for July 18-31, 1989 are in Doc. 19, Appendix 1, Exhibit 10.

46. A recommendation for the discharge of Geraldine Martin for violation of the Attendance Policy was issued on September 15, 1989, but Costa overruled it. A true and accurate copy of the recommendation is in Doc. 19, Appendix 1, Exhibit 11.

In Order To Avoid Summary Judgment, Plaintiff Must Submit Sufficient Evidence To Withstand A Direct Verdict Motion.

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; see Celotex Corp. v. Catreet, 477 U.S. 317,322 (1986); Anderson v. Liberty Lobb, Inc., 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of

genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. Celotex Corp., 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion. In response to a summary judgment motion properly supported by evidence, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." Sixty Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987); Harris v. Adams, 873 F.2d 929, 931 (6th Cir. 1989).

The trial judge's function is not to weigh the evidence and determine the truth of the

matter, but to determine whether there is a genuine factual issue for trial. Anderson, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of act. Street v. J.C. Bradford & Co., 886 F.2d 1742 (6th Cir. 19889); Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The court should apply the federal directed verdict standard. Street, 866 F.2d at 1479. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law." Anderson, 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted.

Street, 886 F.2d at 1478 (citing Celotex and Anderson). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Rahn Has Presented Prima Facie Evidence of State Action

Drake contends it did not act under a color of state law when it discharged Rahn. It claims Costa acted in a routine manner without consulting his superiors in effecting the discharge. It asserts there is no evidence tending to show state participation in Rahn's discharge.

Drake relies primarily upon cases where the

issue was whether there was sufficient state participation in a private enterprise to warrant the conclusion that state action occurred. See Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989); Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988), cert denied, 488 U.S. 1042 (1989); Wagner v. Metropolitan Nashville Airport Authority, 772 F.2d 227 (6th Cir. 1985); Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984); Bier v. Fleming, 717 F.2d 308 (6th Cir. 1983), cert denied, 465 U.S. 1026 (1984). This line of authority holds that state action is not necessarily present merely because a private entity is funded by the state, see Blum v. Yaretsky, 457 U.S. 991 (1982), or because it is subject to state regulation. See Jackson v. Metropolitan Edison Co., 419 U.S. 345. State action has been found to exist, however, where

there is so close a nexus between the state and the challenged act of an ostensibly private organization that the state can be said to be responsible. Blum, 457 U.S. at 1004; Jackson, 419 U.S. at 351.

This analysis overlooks a preliminary question that must be addressed in this case. Before examining whether there was a state participation in the actions of a private entity, we must determine whether Drake was in fact a private at the time of the events in this case. In deciding whether an entity is public or private, we examine the structure of the entity and its relationship to a governmental unit. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Milo v. Cushing Municipal Hospital, 861 F.2d 1194 (10th Cir. 1988).

In the instant case, Drake was originally a

state entity established pursuant to Ohio Rev. Code Chapter 339. It was known as Daniel Drake Memorial Hospital and was owned and operated by Hamilton County until July 1, 1989. Gilreath was appointed Administrator in February 1988, in an effort to overcome very serious problems existing at DDMH. These problems included criminal and civil litigation and public outcry regarding what the parties have called "the Donald Harvey incident."[1] Harvey, a former nurse's aide at DDMH, on a date not established in this record, admitted to murdering 24 patients there in 1987. Subsequently, in January and February 1988, the hospital's accreditation and Medicare certification were withdrawn.

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[1]Although the parties have submitted little information on the subject, the news article attached as Exhibit 5 to Doc. 16 provides information which, if properly presented at trial, would establish the aforesaid facts.

These and other problems consumed so much of the Hamilton County Commissioners' time that they desired to find a way to have some other entity assume responsibility for operating DDMH. In March 1988, DDMH Administrator Gilreath advised the County Commissioners to "get out of the business" and to approach UC to operate the hospital. (Gilreath Dep., pp. 19-21). UC agreed to operate Drake on the condition that the Drake Tax Levy passed. "That levy had to pass a vote before the University could accept responsibility for the operation of Drake Center." Id., p. 23. No contingency plans were made for DDMH. If the levy did not pass, UC would not take control of DDMH and it would cease to exist. Id., p. 24. In May 1989, the levy passed, guaranteeing Drake twenty million dollars per year for five years. The tax levy constituted about fifty percent of

Drake's revenues. The remainder came from Medicare and Medicaid and occasionally a rare private patient. Id., pp. 24-27.

Hamilton County entered into the lease arrangement with Drake pursuant to Ohio Rev. Code § 140.05. In providing for the lease of public hospital facilities to a "hospital agency" to operate, the Ohio legislature required that the public body granting the lease must determine, and set forth by law, that the lease will promote the public purpose the legislature set forth in § 140.02 and that the lessor (here Hamilton County) will be duly benefitted thereby. Id. The stature requires the lease to provide for limitations on the operation of the hospital by the "hospital agency," including operation and provision of services without discrimination by reason of race, creed, color, or national origin.

Id.

The February 2, 1989 agreement that created Drake (Creation Agreement) was entered into by Hamilton County and UC, both agencies of the state. Pursuant to the agreement, UC must assign members of its Hospital Housestaff to provide medical care at Drake; and it must assign members of its College of Medicine faculty to teach and supervise the Hospital Housestaff at Drake, to perform administrative and supervisory functions at Drake, and to make their expertise available to the Drake staff and patients. UC also agreed to make its faculty and employees available to Drake for strategic and financial planning, budget development, operational planning, and medical and patient care planning prior to transfer of the hospital facilities and funds to Drake. UC further agreed to provide a person to

act as Drake's chief executive officer. This person would remain a UC employee, but would operate Drake hospital. Hamilton County agreed to use its best efforts to pass the 1989 Drake Hospital Tax Levy and to conduct such a levy annually and transfer the proceeds to Drake. The agreement requires Drake to provide medical care to all indigent Hamilton County citizens who meet admission criteria to the extent the cost of such care is reimbursed by the proceeds of the tax levy then in effect.

The Lease and Operating Agreement (Lease) entered into by Hamilton County and Drake on June 2, 19889, has an initial term of fifty years. Drake leases the hospital premises for one dollar per year. The lease contains the same requirements as the Creation Agreement with regard to providing medical care to indigent

citizens of Hamilton County. Drake must submit semiannual reports to the Hamilton County Commissioners to show that it is in compliance with the terms of the Lease. The Lease is made contingent on the passage of the Drake Hospital Tax Levy.

According to Drake's articles of incorporation, only Hamilton County and UC can appoint members of Drake's Board of Trustees. Six of the nine Board members are appointed by UC and three are appointed by Hamilton County. Three initial trustees were appointed in the articles of incorporation, to serve until the first annual meeting or meeting to elect trustees. These were all public officials: UC President Joseph Steger; Dr. Donald Harrison, UC Vice President of Medical Affairs; and Thomas Wenz, Hamilton County Administrator. These public officials

constituted the Drake Board at the time of Rahn's discharge.

On July 5, 1989, Drake and UC entered into an agreement (Management Agreement) whereby Drake agreed to appoint a UC employee to serve as Drake President. This UC employee was to be chosen by the Drake Board, and was subject to final approval by the UC President. The Management Agreement details the duties and responsibilities of Drake's President. It provides that the Drake President shall remain a UC employee and his compensation is to be negotiated with and paid by UC. Drake is to reimburse UC for an unspecified portion of its President's salary, to be negotiated between UC and Drake. While Drake has the right to discharge its President, it may only do so for reasons specified in the Management Agreement, and it must eventually replace him

with another UC employee. In addition to the Management Agreement, there are contracts between various UC departments of medicine and Drake providing for the services of UC medical personnel at Drake. (Gilreath Dep., p. 18).

Pursuant to the Management Agreement, the Drake Board appointed Gilreath, the former DDMH Administrator, as Drake President. In addition to Gilreath, UC employees constitute Drake's medical faculty, physiatrist, and physical medicine and rehabilitation physicians. (Gilreath Dep., pp. 6,7). Gilreath assigned Costa to be responsible for all personnel decisions, excepting medical staff and officers reporting directly to the President or Board.

The aforementioned facts distinguish this case from those cited by Drake in support of its claim that there is no material evidence of state

action. State involvement in the operation of Drake is far more extensive than that in Crowder, 740 F.2d 447. As Gilreath explained in his deposition, the Hamilton County Commissioners approached UC, another state entity, to operate the hospital in their stead in order that they could focus on other Commission matters. UC refused to undertake this responsibility unless the Drake Tax Levy passed, guaranteeing public funds to support the hospital. Two UC officials and one Hamilton County Commissioner, all state officials, made up the Drake board. In Crowder, only two of thirteen board members were public officials. Furthermore, the future makeup of Drake's board is controlled by UC and Hamilton County, both state entities. In Crowder, the initial purchase and lease-back of the hospital was financed by a bond issue, which the hospital

was bound to repay. Here, virtually all of Drake's funding comes from public tax levies and governmental programs. Private patients are virtually non-existent. Drake only pays one dollar per year to lease the premises. Drake has been delegated Hamilton County's obligation of providing health care for its indigent citizens. There is no such indication in Crowder. Drake was the center of widespread public attention and debate during the time in question. There is no such indication in Crowder. Although the hospital in Crowder was subject to extensive state regulation, there was no state involvement in day-to-day hospital operations. Here, a state employee, Gilreath, is the hospital president responsible for day-to-day operations and his duties and responsibilities are controlled by the Management Agreement, to which UC was a party.

UC medical personnel staff Drake.

In Crowder, the Sixth Circuit agreed with the decisions in Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1974) and Hampton v. City of Jacksonville, 304 F.2d 329 (5th Cir.), cert denied, 371 U.S. 911 (1962), by recognizing that state action should be found to exist where there is evidence of significant control over the use of the facility or a substantial role in its day-to-day operations. Crowder, 740 F.2d at 453. In the instant case, despite the trappings of private incorporation, UC employee Gilreath continued to operate Drake for the public benefit in the same fashion as he had for the County Commissioners. Through Gilreath, UC's medical personnel assigned to Drake, and the terms of the Management Agreement, the state controlled Drake's day-to-day operations. The state also

held the purse strings, because Drake was substantially financed by public tax levies and government programs. This is sufficient evidence from which a reasonable juror may find that Drake was in fact a state entity during the pertinent time period.

Assuming, arguendo, that a jury would find Drake to be a private entity, nevertheless there is sufficient evidence from which a reasonable juror could find state action in Rahn's discharge. Under circumstances revealing less state involvement than this case, the federal courts have held that neither leasing to a private entity nor contracting with it for day-to-day management will insulate state actions. Milo, 861 F.2d at 1197; Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214, 1221-22 (5th Cir. 1987), cert denied, 484 U.S. 1010

(1988). "The [state] cannot benefit from private management of the hospital and at the same time insulate itself from liability for [improper acts] performed by that manager. The private defendants cannot receive public funds utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any correction of a violation of the constitutional rights of their medical staff." Jatoi, 807 F.2d at 1221-22.

Rahn Has Presented Prima Facie Evidence That She Engaged In Protected Activity

Drake argues that the actions upon which Rahn bases her retaliation claim do not constitute protected speech, because she did not speak out on a matter of public concern.

Rahn's alleged protected activity is as follows. She claims she was concerned about

UC's involvement with Drake and directed a letter to the County Commission for clarification. On July 1, 1989, an article appeared in the Cincinnati Post newspaper indicating Gilreath planned to move seventy-five percent of Drake's patients out of the facility. (Doc. 19, Ex. 5). This news alarmed Rahn and patients' family members. About four hundred persons, consisting of past and current Drake employees and patients' family members and relatives, formed a Committee to Maintain and Improve Drake Hospital. Rahn was the Committee's Chairperson. (Doc. 19, App. 1).

On July 18, 1989, she attempted to present to Gilreath a press release outlining the Committee's concerns. She left the document with Drake's Public Relations Director. Rahn had been scheduled to work that day and "called off work" in accordance with the guidelines and was

assessed one penalty point. She also spoke on television that day and "voiced the concerns in the press release." Id. Rahn denies publishing any document other than the press release (Doc. 19, Ex. 6); thus, there is no other protected activity upon which she bases her claim.

Rahn does not specifically state what information she provided to the television audience, other than as referenced above. In the release, purporting to speak as Committee Chairperson, she stated "[t]he Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray." She then criticized Gilreath and his assistant for "strong arm and closed door tactics." She claimed Gilreath perceived Drake as a private hospital not subject to scrutiny of the County citizens

and questioned whether the citizens intended this when they passed the twenty million dollar per year tax levy. She questioned Gilreath's "purge" of existing staff and patients. She requested clarification of five matters: 1) new work rules causing discontent and absenteeism among the hospital staff; 2) failure to publish long and short term goals and disregard of input from staff, patients, relatives and citizens; 3) failure to disclose the "actions and philosophies of the new Hamilton County-University of Cincinnati corporation formed to operate the hospital," 4) a desire for specific information about staffing, budget, etc; 5) the "desecration" of employee benefits and retirement funds without consulting the staff. She called for an open meeting among the County Commissioners, UC officials, Drake administrators, citizens, Drake

staff, Drake patients and relatives to discuss these matters. She also called for Gilreath's resignation and "a new progressive, positive and capable administrator." The release is signed by thirty-ne apparent Committee members. (Doc. 19, Ex. 6).

The crucial issue regarding protected speech is "whether an employee's speech addresses a matter of public concern," an inquiry to be "determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-48 (1983). Thus, every case requires careful scrutiny of the facts surrounding the employee's declaration. The difference between public and private speech has been well-stated by the Ninth Circuit:

> Speech by public employees may be characterized as not of "public

> concern" when it is clear that such speech deals with individual personnel disputes and grievance and that the information would be of no relevance to the public's evaluation of the performance government agencies. . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 1110, 114 (9th Cir. 1983)(citations omitted). The D.C. Circuit stated the test even more succinctly: '[T]he role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontended employee do not." Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert denied, 470 U.S. 10150 (1985).

Rahn's press release includes elements of both concerns. It reflects her dissatisfaction, as an employee, with Drake's operations and could

be interpreted as a personal vendetta against Gilreath. The mere fact that public monies and efficiency of public servants are the subject of the speech does not, in itself, qualify that speech as being addressed to a matter of public concern. Barnes v. McDowell, 848 F.2d 725, 734 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1989). Were the rules otherwise, a public employee could always shield herself from discipline for speaking out on a private complaint by including reference to such matters.

On the other hand, Rahn's release also seeks to reveal to the public that their substantial tax dollars, voted to operate a hospital for the County indigent, are being used for other purposes. This is a matter that invokes first amendment protection. See Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986). To the extent

it is possible to read the release as charging corruption by a public official, it deserves protection. Barnes, 848 F.2d at 734. Unquestionably the television station that published Rahn's statements viewed them as matters of sufficient public concern to warrant inclusion in their 5:30 p.m. new broadcasts. Unfortunately, evidence of the specific content of Rahn's broadcast has not been presented to the Court. Nevertheless, the Supreme Court approved a District Court's finding that a public school teacher's telephone call to a radio station regarding the adoption of a dress code at the school, which the station announced as a news item, was "clearly protected by the First Amendment." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 283 (1977). Additionally, although Rahn has not, at this

stage of the case, provided much detailed background information about the public controversies existing in 1989 regarding Drake, there is enough information present to indicate that activities at Drake were at that time a matter of public concern in Hamilton County, Ohio.

Taking all these matters into consideration, the evidence presently before the Court sufficiently indicates the existence of facts which create a material dispute as to whether Rahn's speech was protected activity. While further development of the facts would be of assistance to the jury in putting Rahn's statements in their proper perspective, whatever that may be, there is presently sufficient evidence from which a jury could conclude her speech was entitled to First Amendment

protection.

Rahn Has Presented Prima Facie Evidence of Retaliation

Drake claims it is entitled to summary judgement because, even if Rahn engaged in protected activity and her discharge was the result of state action, the evidence shows she was discharged for reasons unrelated to her protected activity.

In addition to establishing that Drake was a state actor and her speech was constitutionally protected, Rahn must also prove that the protected speech was a substantial, i.e. a motivating factor in the adverse employment action against her. Mt. Healthy, 429 U.S. at 287; Langford v. Lane, 921 F.2d 677, 680 (6th Cir. 1991) reh'g denied (Feb. 25, 1991).

The parties have presented little, if any,

evidence regarding Rahn's work performance and relationships with Gilreath and Costa prior to July 1989. Starting with an apparent clean slate in July 1989, the record reveals Rahn had no attendance problems prior to the issuance of her press release. It appears she generated substantial support for her Committee. In turn, the Committee was severely critical of Gilreath's administration and publicly called for his resignation. Gilreath admits watching Rahn's speech on television during the 5:30 p.m. news on July 18, 1989. (Gilreath dep., p. 37). Gilreath was also informed by his assistant that day that Rahn had left "a package" at the hospital addressed to the Drake board and the County Commissioners. He opened the package the next day, and found it contained a list of allegations, including misuse of public funds,

etc. Id., pp. 83-43. Gilreath was "frustrated" by Rahn's actions - he felt she was trying to destroy what he had attempted to build up, and he felt he was being tried and convicted in the news media. Id., pp. 43-44. Rahn testified that while she was at Drake on July 18, 1989 to deliver her press release, she saw Costa. Costa, who was aware of her Committee activities asked, "Aren't you supposed to be working today?"

Rahn claims she was not originally scheduled to work on July 21, 1989, but that the schedule had been changed without her knowledge. Drake agrees that a schedule printed July 12, 1989 was different from the schedule Rahn had been working since January 1989. The parties agree than no one advised Rahn of the schedule change, and Rahn admits it was her responsibility to check the posted schedule. The parties also agree that

Rahn's schedule change could have resulted from a computer or clerical error. Because Rahn was not aware of the schedule change, she did not report for work on July 21, 1989. This failure to report earned her two more penalty points, which apparently justified her dismissal pursuant to Drake policy. Upon learning that Drake had not reported for work that day, Costa sent a courier to her house to advise her she was discharged. Costa did not offer Rahn a chance to explain why she was unaware of her schedule, and he did not consider the possibility of clerical or computer error. Rahn claims she immediately attempted to contact Costa and was told he was not available. She asked the nursing office what her status was. They told her she was terminated and should not report for work as scheduled the next day. She claims she attempted to speak to Costa on July

22, 1989, and was told he was not available. She spoke to the nursing office and was told to call back on Monday, July 24, 1989. She claims she called on July 24 and was told Costa was unavailable. On the morning of July 25, 1989, Costa called her at her son's home, where she was babysitting and conducting a Committee meeting. He told her to come to the hospital immediately. She said she could not because she was babysitting. Costa replied that he knew she was having a Committee meeting, that she need not come in, there was nothing to discuss. On July 26, 1989, Costa mailed her a letter confirming her discharge. Doc. 19, App. 1, Ex. 8. Rahn wrote Gilreath on August 1, 1989, advising she was filing a grievance for being discharged for speaking out. He did not reply. Doc. 19, App. 1, Ex. 9.

Rahn alleges other similarly situated employees were treated differently. She claims that Drake excused the absence of Mary Lynn on July 25, 1989 and July 28, 1989 which would have resulted in her accumulation of more than three points under Drake's Attendance Policy. Drake alleges Mary Lynn was not assessed any points on July 25 and July 28, 1989 because her absence were approved beforehand. Rahn claims Drake excused the absence of Geraldine Martin, who accumulated 3.5 points under Drake's Attendance Policy. Drake alleges that Geraldine Martin did not accumulate 3.5 points under the policy because her supervisor incorrectly interpreted the policy and assured Ms. Martin that she would not be assessed pointed for her absences on July 11, 12 and 13, 1989. Since these absences were approved by her supervisor, Ms. Martin was not

assessed any points for them. Thus, there are disputed material facts regarding treatment of similarly situated employees.

The aforementioned facts present a jury question as to whether Rahn was terminated because of her July 18, 1989 press release or because of her attendance record. A material issue for the jury to determine is whether Costa's actions deviated from the normal procedure used to discharge employees with attendance problems. There is also evidence from which a reasonable juror may conclude that Costa discharged Rahn because he considered her a troublemaker or because he thought Gilreath would want him to do so, even though he had not discussed it with Gilreath. Supporting these possible inferences are the timing of the discharge and the fact that Gilreath was Costa's

immediate superior and was "frustrated" by Rahn's press release. Costa gave Rahn no notice prior to discharge and no opportunity to explain her actions. On the same day she allegedly violated the attendance policy, a courier was dispatched to her home to notify her she was discharged. Following her protected activity by only three days this action alone may support an inference of retaliation. See Polk v. Yellow Freight Systems, 876 F.2d 527 (6th Cir. 1989); see also Ratliff v. Wellington Exempted Village Schools Board of Education, 820 F.2d 792 (6th Cir. 1987).

In concluding that Rahn has presented sufficient evidence to establish a prima facie case of retaliation, we express no opinion as to the ultimate outcome of the litigation. There is also substantial evidence supporting Drake's position. We simply believe that, based on the

facts presented, Rahn should not be deprived of her day in court.

Drake Has Failed To Demonstrate That There Is No Material Dispute As To Whether Rahn Would Have Been Discharge In Any Event

Drake alleges that, even if Rahn can establish that she was discharged for protected activity, Drake can prove that Rahn would have been discharged anyway for insubordination.

Once a plaintiff in a free speech case establishes by a preponderance of the evidence that the employer retaliated against her for protected activity, the employer may still prevail if it can establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy, 429 U.S. at 287; Langford, 921 F.2d at 680.

Drake claims that "plaintiff's actions were indisputably private and had no other purposes than to cause dissention in the workplace." Doc. 16, p. 15. We have already determined that the press release set forth in Doc. 19, Ex. 6 was not indisputably private. If the jury were to find that it constituted protected activity, a discharge for insubordination based on the press release would not relieve Drake of liability. Since Rahn denies issuing any other materials and contends that other materials are also protected, there is a material factual dispute regarding insubordination.

Because there is conflicting evidence on this issue and because Drake has the burden of proof thereon, summary judgment is not appropriate.

The Court Should Not Exercise Pendent Jurisdiction

Citing numerous similar cases by Judge Weber of this Court, Drake asserts we should decline pendent jurisdiction over Rahn's state claims.

To the extent Rahn's Ohio constitutional claim is identical to the federal constitutional claim, Rahn's rights are secured under the federal aegis. No Ohio court has determined the scope of the Ohio free speech right. To the extent that it may be different from the federal right, this Court is not the appropriate forum to determine that scope. Therefore, pendent jurisdiction over that claim is not warranted.

As regards Rahn's wrongful discharge claim, Ohio law on that issue is still developing and the elements differ from those that make up Rahn's federal claim. Inclusion of the issue in this case could add significant additional

briefing and trial time and could lead to jury confusion. For these reasons, pendent jurisdiction is not warranted.

IT IS THEREFORE ORDERED THAT:

1. Drake's motion for summary judgment on Rahn's 42 U.S.C. § 1983 claim is **DENIED.**

2. Rahn's state law claims are **DISMISSED** without prejudice.

Date: 1/31/92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrat

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Rosemary Rahn,
Plaintiff

vs Case No. C-1-91-027

Drake Center, Inc.
Defendant

ORDER

This case is before the Court upon plaintiff Rahn's motion for equitable relief (Doc. 60) and defendant Drake Center's renewed directed verdict motion and motion in opposition to the punitive damages award (Doc. 63). These motions follow a jury trial and verdict in Rahn's favor. Rahn alleged that Drake Center discharged her for

exercising her First Amendment rights. The Court determined that Drake Center's discharge of Rahn in July 1989 constituted state action and that her speech, which she alleged motivated the discharge, was protected by the First Amendment. The jury determined that Rahn's speech was a substantial or motivating factor in her discharge, and that she would not have been discharged in the absence of such speech pursuant to Drake Center's attendance policy. The jury found that Drake Center's discharge of Rahn proximately caused $11,723 in the damages, and they assessed punitive damages in the amount of $60,000 against Drake Center.

RAHN'S MOTION FOR EQUITABLE RELIEF IS GRANTED

Rahn requests equitable relief in the form of reinstatement to her employment for the period

from July 21, 1989 through January 4, 1991, for the purpose of requiring Drake Center to make all contributions to the Ohio Public Employees Retirement System that would have been made for that period had Rahn not been discharged. This would result in Rahn accumulating ten years of service under the Retirement System, would increase her current monthly retirement benefit, and would provide her with free health insurance for her lifetime and permit her to purchase health insurance for her spouse at the rate of twenty dollars per month.

Drake Center has not opposed Rahn's motion for injunctive relief, to which she is entitled as a result of the jury's factual findings. See Gutzwiller v. Fenik, 860 F.2d 1317, 1333 (6th Cir. 1988). Therefore, the motion is granted.

DRAKE CENTER'S RENEWED DIRECTED VERDICT MOTION AND MOTION OPPOSING PUNITIVE DAMAGES IS DENIED

There Is Sufficient Evidence To Support The Court's Determination That Drake Center's Discharge of Rahn Constituted State Action

Drake Center renews the directed verdict motion it presented at the close of Rahn's case-in-chief, arguing that Drake Center did not engage in state action when it discharged Rahn. This argument is premised on two assumptions: 1) the facts do not support a finding that Drake Center meets the legal criteria for a state actor, and 2) Rahn's discharge was pursuant to a neutral attendance policy that had no relation to state interests or actions.

As we stated in denying the directed verdict motion at trial, Drake Center is not entitled to Eleventh Amendment immunity. Applying the nine-point test which the Sixth Circuit adopted, see Hall v. Medical College of Ohio at Toledo, 742

F.2d 299, 302-07 (6th Cir. 1984), citing Blake v. Kline, 612 F.2d 718 (3d Cir. 1979), we determine that Drake Center is not an arm or alter ego of the state of Ohio, but is more closely associated with the state's political subdivision, Hamilton County.

As regards state action, the Supreme Court has developed three tests to determine whether the challenged conduct is fairly attributable to the state or its political subdivision: the public function test, the state compulsion test, and the symbiotic relationship or nexus test.

Drake Center Meets The Public Function Test

The public function test requires that Drake exercise powers that are traditionally exclusively reserved to the state. West v. Atkins, 487 U.S. 42, 49-50 (1988); Flaggs Bros.

v. Brooks, 436 149, 157 (1978). Although the Sixth Circuit has ruled that providing mental health services has not been a power that has traditionally been exclusively reserved to the State of Ohio, see Wolotksy v. Huhn, No. 91-3677, 1992 WL 655441 (6th Cir. Mar. 4, 1992), the evidence in this case reveals that in the Cincinnati - Hamilton County, Ohio area, long term mental health care for the needy has traditionally been exclusive governmental function. In 1927, the City of Cincinnati deeded to Hamilton County the land which Drake Center's predecessor occupied with a restriction that it be used for this purpose and a requirement that the land revert back to the city if the restriction is not complied with.

Drake was administered for a long period of time by the Hamilton County Commissioners. In

the late 1980's, the Commissioners encountered very serious problems in operating Drake Center, including criminal and civil litigation and public outcry regarding what the parties have called "the Donald Harvey incident." Harvey, a former nurse's aide at DDMH, admitted to murdering 24 patients there in 1987. Subsequently, the hospital's accreditation and Medicare certification were withdrawn. These and other problems consumed so mucn of the Commissioners' time that they desired to find a way to have some other entity assume responsibility for operating DDMH. The Commissioner's appointed Earl Gilreath, a University of Cincinnati (UC) employee, as DDMH Administrator in February 1988 to help resolve the problems. On Gilreath's advice, the Commissioners requested UC to operate the

hospital. UC is a state entity. UC agreed to do so on the condition that the voters approved the Drake Hospital Tax Levy to fund the hospital's work. In May 1989, the Levy passed, guaranteeing the hospital twenty million dollars per year for five years. In 1989 the Levy constituted about fifty percent of the hospital's revenues. The remainder came from Medicare and Medicaid and occasionally a rare private patient. Id., pp. 24-27. Drake Center was then privately incorporated on May 17, 1989.

In 1989 Drake Center, operated and controlled by state and county organizations, continued to provide the only source of long term mental health care for the indigent in Hamilton County, Ohio. Such care had traditionally been provided in Hamilton County by the City of Cincinnati and then by the County itself.

Gilreath testified that no other place in Hamilton County exists for the indigent to receive such care. Thus, Drake Center meets the public function test.

Drake Center Meets The State Compulsion Test

The state compulsion test requires that a state or its political subdivision exercise such coercive power or provide such significant encouragement that in law the choice of the private actor is deemed to be that of the state. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Brier v. Fleming, 717 F.2d 308, 311 (6th Cir. 1983), cert denied, 465 U.S. 1026 (1984). The City of Cincinnati's land restriction is an exercise of coercive power as to Drake Center's function. Section 1.5 of the Agreement between Hamilton County and the City of Cincinnati, dated

February 22, 1989, provides that the Drake Center must be operated as an institution for the delivery of hospital and health care services principally for Hamilton County citizens. (Jt. Ex. 4, p. A000264). Section 1.8 of the agreement provides that Drake Center must provide care to all indigent and medically indigent Hamilton county citizens who meet admission criteria to the extent it is reimbursed for the costs of such care by the proceeds of the Drake Hospital Tax Levy. Id. These provisions, in an agreement between a state entity, UC, and the state's political subdivision, Hamilton County, are also an exercise of the state's coercive power over Drake Center.

In July 1989, all of Drake Center's Board Members were appointed either by the state, through UC, or by its political subdivision,

Hamilton County. UC employed Drake Center's President, Gilreath who remained a state employee during his tenure at Drake. Gilreath was required to report semi-annually to the Hamilton County Commissioners. Gilreath formulated Drake Center's personnel policies and decisions, including the decision to adopt the Orientation Policy pursuant to which Rahn was discharged. That policy was approved by Drake Center's Board of Directors and signed by Gilreath. This is further evidence of state compulsion. Wooltsky, at 9.

Drake Meets The Symbiotic Relationship Test

Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action

so that the action may be fairly treated as that of the state itself. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). In order for the conduct in question to be attributed to the state, it must be demonstrated that the state is intimately involved in the challenged activity. Wolotsky, at 9; Bier, 717 F.2d at 311. In addition to the factors set forth above, the following evidence of state/county involvement in the challenged conduct, which occurred during 1989, was presented at trial.

Drake paid only one dollar per year to lease the premises.

All Drake Center Board members were state or county officials.

The state and county controlled the future makeup of Drake Center's Board.

Virtually all of Drake Center's funding came

from public funds; private patients and private revenues were virtually non-existent.

A state employee, Gilreath, was in charge of Drake's day-to-day operations. His duties and responsibilities were controlled by the Management Agreement between Drake and UC. Thus, by virtue of his state employment and the management agreement, the state exercised substantial control over Gilreath. UC Medical personnel staffed Drake.

Gilreath believed that a harsh orientation policy was needed to "stop hemorrhaging;" i.e. to correct serious attendance and other problems at Drake Center. He personally participated in drafting the policy and signed it.

Rahn, who was Chairman of the Committee to

Maintain and Improve Drake Hospital, comprised of former DDMH employees, past and present Drake Center employees, patients and their family members, and citizens, issued a press release on July 18, 1989 which is the subject of the case. In the release, Rahn severely criticized Gilreath's operation of Drake Center. She claimed that his work rules caused widespread discontent among the staff, creating high absenteeism and possible patient endangerment. She called for an open meeting with various public officials, and she called for Gilreath's resignation.

Shortly after this speech, Rahn was discharged under unusual circumstances.

The jury found, by a preponderance of the evidence, that Rahn's speech, in writing and

to a television audience, was a substantial or motivating factor in Rahn's discharge. They also found insufficient evidence to prove that Rahn would have been discharged in any event for violation of Drake Center's attendance policy.

The symbiotic relationship or nexus test has been satisfied, based on the jury's findings. They determined that Rahn's criticism of Gilreath's operation of Drake Center was a motivating cause in her discharge and rejected Drake Center's claim that her alleged violation of the attendance policy motivated her discharge. The individual who discharged Rahn was Michael Costa, Vice President of Human Resources and Gilreath's immediate subordinate. Costa had responsibility for implementing the

orientation policy which was the subject of Rahn's critical speech. Thus, the activities of state actors in operating Drake Center were intimately connected with Rahn's discharge.

Drake Center's argument that Rahn's discharge was similar to any other discharge under the orientation policy ignores the jury's findings. Rahn convinced the jury that her discharge was not routine under the orientation policy, but was due to her speech, which criticized Drake Center administration. Drake Center failed to convince the jury that Rahn was discharged for violation of the orientation policy or that her discharge was handled in a routine manner. Therefore, the cases cited by Drake Center in its brief are inapposite.

In finding state action, we rely upon Carnes

v. Parker, 922 F.2d 1506, 1509 (10th Cir. 1991); Milo v. Cushing Mun. Hospital, 861 F.2d 1194 (10th Cir. 1988); and Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214 (5th Cir. 1987), cert denied, 484 U.S. 1010 (1988). Our determination is also consistent with the standards for state action set forth in the following Sixth Circuit cases which found absence of state action: Wolotsky, 1992 WL 655441; Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988); cert denied, 488 U.S. 1042;; Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984). See also Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964) and Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), cert denied, 371 U.S. 911 (1962), cited with approval inn Crowder.

There Is Sufficient Evidence To Support The Jury's Determination That Drake Center Failed To Establish That Rahn Would Have Been Discharged Due To Her Violation Of Its Orientation Policy

Drake Center argues that it has proved, as a matter of law, that Rahn would have been discharged in any event due to her violations of its attendance policy. Unfortunately, Drake Center cites no authority for the proposition that it has proved this fact "as a matter of law." Although Drake Center fails to so state, it appears to be seeking a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50. Failure to cite authority for its position is reason alone to deny the motion. Local Rules 7.2(a)(1),(b)(1).

The issue raised by a j.n.o.v. motion is whether there was sufficient evidence to raise a question of fact for the jury. O'Neill v.

Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). In order to prevail on this motion, Drake Center must show that, viewing the evidence in the light most favorable to Rahn and drawing all reasonable inferences in her favor, reasonable jurors could only have found that Rahn would have been discharged under the attendance policy in any event. Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1986), cert denied, 480 U.S. 919 (987). This Court may not weigh the evidence, pass on the credibility of witnesses or substitute its judgment for that of the jury. Id. See also Erskine v. Consolidated Rail Corp., 814 F.2d 266, 269 (6th Cir. 1987). The fundamental principle in considering a j.n.o.v. motion is "that there must be minimum of interference with the jury." Chappell, 803 F.2d at 265.

There is no dispute that once the jury found that Rahn's speech was a substantial factor in her discharge, the burden of proof shifted to Drake Center to establish that she would have been discharged anyway. See Mt Healthy City School Dist. Bd. v. Doyle, 429 U.S. 274, 287 (1977). There was an abundance of evidence contradicting Drake Center's affirmative defense.

Drake Center argues that Rahn's deposition statement that, if her schedule for July 21, 1989 was not a "fabricated document" she would have been properly terminated, establishes its affirmative defense. It cites no authorities for this proposition. The actual context of Rahn's alleged admission paints a different picture. At her deposition, Rahn stated that she believed the attendance schedule for July 21 to be a "fabricated document." (Rahn Testimony, Vol. 2,

p. 14). Rahn was asked several times by Drake Center's attorney to admit that if the schedule was not fabricated, she was required to be terminated under the attendance policy. Id. Rahn refused several times to agree to this hypothetical question. Id., pp. 14-15. Finally, after the attorney instructed her she had to answer the question, she said "Yes." Id. p. 15

This alleged admission is not binding on Rahn for several reasons. First, she testified at trial that she originally believed that Drake Center altered her work schedule after the July 18 press conference in order to trap her into an attendance violation that would result in her discharge. Id., p. 13. She later changed her mind based on the statement of Donna Bryan, whom Rahn trusted, that the schedule change was an "error." Second, Drake Center was never able to

satisfactorily explain how Rahn's schedule, which had remained the same for a long period of time, became changed after the County Commissioners had instructed Gilreath to address Rahn's concerns (see Pl. Ex. 1) and at about the time she became Chairman of the Committee to Maintain and Improve Drake Hospital. Thus, there is some support in the evidence for Rahn's suspicions about her schedule change. Therefore, the jury would have been justified in finding that Drake Center did not prove the premise of its hypothetical question, i.e. that Rahn's new schedule was not "fabricated." Third, even if the schedule was genuine, Rahn's deposition statement was based on a hypothetical question instead of her personal knowledge and was forced from her despite her repeated attempts to avoid stating her opinion on the subject. Finally, Rahn's "admission" does

not take into account the key issue in this case - whether in practice Drake Center permitted exceptions to the attendance policy.

Drake Center's theory of this case was that a harsh, mandatory attendance policy was adopted during its three months orientation period. Pursuant to this policy, Drake Center asserted, any employee who accumulated three points was "automatically terminated," with "no appeal rights." (Drake Center Memorandum, Doc. 63, pp. 3,4).

This theory was substantially contradicted by the evidence in the case.

The most persuasive evidence disproving Drake Center's theory was the letter Costa delivered to Rahn by courier on July 21, 1989, the date she accumulated her third point. After informing Rahn that employees who accumulate

three points will be terminated, Costa stated, "Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guideline as soon as possible, but no later than July 22, 1989." (Jt. Ex. 18). The jury could logically have understood this statement to mean than Rahn would be terminated unless she could demonstrate "extenuating circumstances." The reasonable, logical inference any juror would draw from this letter is that discharge was clearly not "automatic," as alleged by Drake Center's attorneys, but depended on whether extenuating circumstances existed. If discharge were automatic, Costa would have discharged Rahn via the July 21, 1989 letter.

Evidence of employees who were not discharged because extenuating circumstances

existed corroborated the above-described inference. Employee Geraldine Martin accumulated sufficient points under the policy to require termination by September 15, 1989. However, Costa denied the Nursing Director's termination recommendation due to Martin's reliance on a statement by her supervisor. There was conflicting evidence about whether Mary Lynn and Neva Saunders were absent on enough occasions to accumulate the required points for dismissal but were not discharged, and whether an unidentified respiratory therapist accumulated sufficient points for dismissal, but was not dismissed. (Jt. Ex. 37, Def. Ex. E).

In addition, Rahn's dismissal was unusual. There was no evidence that was not a good employee or that she had a poor attendance record. On that day she failed to appear for

work, thus accumulating the third point necessary for discharge, no one contacted her to determine why she was not there. Had someone contacted Rahn on the morning of her absence, she would have been able to come to work, thus avoiding the accumulation of the points necessary for discharge. There was evidence that, on some occasions, employees had called an individual who did not appear for scheduled work to determine why she was not present. Because Rahn's absence affected patient care, the jury may have found it odd that no one checked with her regarding her absence. The situation was made even more unusual by the fact that Costa, on the same day Rahn accumulated her final point, dispatched a courier to her house to advise her of her possible termination. No other employee had been notified of a pending discharge by courier.

Finally, the jury could have considered the timing of the discharge, coming shortly after an unexplained schedule change and her press conference critical of Drake Center' administration. The jury may have found it doubtful that an employer would summarily discharge a competent employee with a good work and attendance record merely because of the employee had accumulated three attendance points. Common sense may have indicated to the jury that another motive was involved. The fact that Rahn's discharge was handled in such an unusual fashion supported the jury's determination that it was due to her protected speech.

The jury's assessment of credibility could also have resulted in its rejection of the affirmative defense. Rahn appeared to be a credible witness, who exhibited a subdued, but

straightforward demeanor. The jury could reasonably have chosen to believe her rather than Drake Center's witnesses, who did not always exhibit such a demeanor. Rahn testified that Costa had told her schedules would not changed under the new plan; she relied on that statement and did not check the posted schedule, assuming her previous schedule to be unchanged; her schedule was changed without her knowledge, perhaps through a clerical or computer error, under circumstances not adequately explained by Drake Center officials; and Rahn thus accumulated the points that Drake relied on to discharge her. The jury had reason to find that Costa's testimony regarding no exceptions to the attendance policy was impeached by other credible evidence in the case, including his own letter to Rahn. The jury could have relied on this

credibility assessment to find that Drake Center had not proven its affirmative defense.

There Is Sufficient Evidence To Support The Court's Determination That Rahn Engaged In Protected Speech

Drake Center in its motion reasserts its trial argument that Rahn did not engage in protected speech.

Rahn claims she was concerned about UC's involvement with Drake Center and directed a letter to the County Commission for clarification. On June 12, 1989, the President of the Board of County Commissioners responded, explaining the operation of Drake Center. He stated he had written Gilreath requesting that Gilreath contact Rahn and take other appropriate steps to be certain that all employees understand the new governing structure. (Pl. Ex. 1). On July 1, 1989, an article appeared in the

Cincinnati Post newspaper indicating Gilreath planned to move seventy-five percent of Drake's patients out of the facility. (Pl. Ex. 2). This news alarmed Rahn and patients' family members. Numerous persons, consisting of past and current Drake employees and patients' family members and relatives, formed a Committee to Maintain and Improve Drake Hospital. Rahn was the Committee's Chairperson.

On July 18, she attempted to present to Gilreath a press release outlining the Committee's concerns. She left the document with Drake Center's Public Relations Director. Rahn had been scheduled to work that day and "called off work" in accordance with the guidelines and was assessed one penalty point. She also spoke on television that day and voiced the concerns in the press release. In the release, purporting to

speak as Committee Chairperson, Rahn stated "[t]he Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray." She then criticized Gilreath and his assistant for "strong arm and closed door tactics." She claimed Gilreath perceived Drake Center as a private hospital not subject to scrutiny of the County citizens and questioned whether the citizens intended this when they passed the twenty million dollar per tax levy. She questioned Gilreath's "purge" of existing staff and patients. She requested clarification of five matter: 1) new work rules causing discontent and absenteeism among the hospital staff; 2) failure to publish long and short terms goals and disregard of input from staff, patients, relatives and citizens; 3) failure to

disclose the "actions and philosophies of the new Hamilton County-University of Cincinnati corporation formed to operate the hospital;" 4) a desire for specific information about staffing, budget, etc.; 5) the "discretion" of employee benefits and retirement funds without consulting the staff. She called for an open meeting among the County Commissioners, UC officials Drake Center administrators, staff, patients, relatives and citizens to discuss these matters. She also called for Gilreath's resignation and "a new, progressive, positive and capable administrator." The release is signed by thirty-one apparent Committee members. (Doc. 19, Ex. 6).

The crucial issue regarding protected speech is "whether an employee's speech addresses a matter of public concern," an inquiry to be "determine by the content, form, and context of a

given statement as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-48 (1983). Thus, every case requires careful scrutiny of the facts surrounding the employee's declaration. The difference between public and private speech has been well-stated by the Ninth Circuit:

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of government agencies. . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 110, 114 (9th Cir. 1983)(citations omitted). The D.C. Circuit stated the test even more succinctly: "[T]he role of the whistle-blower merits protection; the

expression of personal dissatisfaction by a discontented employee do not." Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert denied, 470 U.S. 1050 (1985). Rahn's press release includes elements of both concerns. It reflects her dissatisfaction, as an employee, with Drake's operations and could be interpreted as a personal vendetta against Gilreath. The mere fact that public monies and efficiency of public servants are the subject of the speech does not, in itself, qualify that speech as being addressed to a matter of public concern. Barnes v. McDowell, 848 F.2d 725, 734 (6th Cir. 1988) cert denied, 488 U.S. 1007 (1989). Were the rules otherwise, a public employee could always shield herself from discipline for speaking out on a private complaint by including reference to such matters.

On the other hand, a substantial portion of Rahn's release seeks to reveal to the public that their tax dollars, voted to operate a hospital for the County indigent, are being used for other purposes. This is a matter that invokes First Amendment protection. See Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986). To the extent it is possible to read the release as charging corruption by a public official, it deserves protection. Barnes, 848 F.2d at 734. Unquestionably, the television station that published Rahn's statements viewed them as matters of sufficient public concern to warrant their inclusion in its 5:30 p.m. news broadcast. The Supreme Court has approved a District Court's finding that a public school teacher's telephone call to a radio station regarding the adoption of a dress code at the school, which the station

announced as a news item, was "clearly protected by the First Amendment." Mt Healthy City Board of Education v. Doyle, 429 U.S. 274, 283 (1977). The President of the Board of County Commissioners also viewed Rahn's claims as a matter of public concern and utilized the time and resources of his public office to formally respond to her letter and instructed Gilreath to do so as well. Additionally, although much evidence on this subject was limited by the Court due to Drake Center's objection, there was evidence that the problems at Drake Center were very substantial and a matter of public concern in the summer of 1989. The creation of Drake Center, just two months before Rahn's press release and its subsequent operation, was also a matter of public debate and concern.

Drake Center Is Liable For Punitive Damages

In the same breath that it denies being an arm of the State or County, Drake Center argues it is immune from award of punitive damages, because county taxpayers would have to pay such an award.

Rahn agrees that punitive damages should not be awarded where the award will be satisfied from taxpayer contributions, but argues that there are sufficient private funds available to satisfy the award. She argues that the jury's punitive damage award of $60,000 amounts to less than three percent of Drake's private revenues and does not jeopardize Drake Center's continued operations.

At the time of the events in question, Drake Center was funded almost entirely by public monies. In support of the instant motion,

however, Drake Center filed an affidavit by its President and Chief Executive Officer which reveals that, for the ten months period ending April 30, 1992, 47.68% of Drake Center's funds deprive from county tax levy receipts, 43.44% of its funds derive from Medicare and Medicaid contributions, 5.81% of its funds derive from "other" sources, and 3.07% if its funds derive from "miscellaneous cash receipts." The amount of private funds received by Drake Center during the affidavit period totals $2,304,860.

Assessing punitive damages against a state actor would not serve the purpose of such an award where the damages would not be paid by the officials responsible for the wrongdoing, but would be "visited upon the shoulders of blameless or unknowing taxpayer." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

At common law, although municipalities were treated like private corporations for the purposes of compensatory damages for a wide range of tortious activity, they were considered immune from a punitive damages award. Newport, 453 U.S. at 259-60. The courts at common law had determined that "[c]ompensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to actual wrongdoers. The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints." Id., at 263.

When the 42nd Congress enacted § 1 of the Civil Rights Act, it chose not to abrogate the municipal immunity from punitive damages. Id., at 264. The legislators were concerned that punitive damages would: 1) "place an unmanageable

financial burden on local governments," and 2) "innocent taxpayers would be unfairly punished for the deeds of persons over whom they had neither knowledge nor control." Id., at 265-66.

This rationale applies equally to state entities such as Hamilton County, Ohio. However, the punitive damage award in this case need not contravene the aforementioned concerns. Drake Center has more than sufficient private revenues to satisfy the jury's $60,000 award. So long as the court specified that said award be paid only from private revenues, none of the aforementioned concerns will be implicated. Furthermore, there is no evidence that payment of the award will result in lack of any services to indigent patients in need of medical attention or would result in the private funds being replaced by public funds.

Drake Center relies upon Bolden v. Southeastern Pennsylvania Transportation Authority (SEPTA), 953 F.2d 807 (3rd Cir. 1991). In Bolden, SEPTA was denied Eleventh Amendment immunity from because it was not considered a state agency, but nevertheless the district court dismissed a punitive damages claim. SEPTA received a larger percentage of private revenues than does Drake Center. The Third Circuit Court Appeals upheld the dismissal because it believed SEPTA "may be analogize to a government entity" for purposes of punitive damages liability. Id., at 830. Because the punitive damages claim was dismissed before the jury's verdict, the court could only speculate about the affect of such an award. The court opined that such an award might result in increased taxes or fares thus punishing the taxpayers and that the deterrent effective

more indirect thus more speculative. The court appeared to be primarily concerned that SEPTA would be a tempting target for large punitive damage awards by juries unduly influenced by SEPTA's size and revenues, "which greatly exceed those of many municipalities." Id., 831.

We believe Bolden to be distinguishable from the instant case and, to the extent it is not, we disagree with its result regarding punitive damages award. SEPTA, the defendant in Bolden, was a far larger entity than Drake Center. It operating funds totaled $554,852,000, Id., at 819 n. 11, while Drake Center's operating funds total $25,953,522.92. Nevertheless, Drake Center's budget certainly qualified as a "deep pocket." More importantly, we do not share the distrust of the jury system inherent in the Third Circuit's speculation that a jury would be tempted by a

defendant's substantial operating funds to render a large punitive damages award. That distrust is not borne out by the verdict in the instant case, which is reasonable and bears a rationale relationship to the facts as found by the jury.

For these reasons, Drake Center is not immune from a punitive damages award.

IT IS THEREFORE ORDERED THAT:

1. Rahn's motion for equitable relief is **GRANTED** and Drake Center is to reinstate her to her previous employment for the period from July 21, 1989 through January 4, 1991, for the sole purpose of Drake Center making contributions to the Ohio Public Employees Retirement System for said period, thereby increasing her retirement benefit, providing her with free health insurance for life and permitting her to purchase health

insurance for her spouse.

2. Drake Center's renewed directed verdict motion on the issues of state action and protected speech is **DENIED.**

3. Drake Center's motion for j.n.o.v. regarding its affirmative defense is **DENIED.**

4. Drake Center is liable to pay the jury award of $60,000 in punitive damages. Said awards must be paid with private revenues only and may not be satisfied through public funds.

Date: 8/27/92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document has been served by ordinary U.S. Mail to Robert S. Brown, Esq., of Brown, Cummings & Brown, Co., L.P.A., 3500 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202 on this 25 day of April, 1995.

David Torchia

David Torchia